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No. 106

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

THE DENVER UNION STOCK YARD COMPANY, *Petitioner,*

v.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,
Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

WINSTON S. HOWARD
320 Equitable Building
Denver 2, Colorado

ASHLEY SELLERS
ALBERT L. REEVES, JR.
JESSE E. BASKETTE
1625 K Street, N. W.
Washington 6, D. C.

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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OCTOBER TERM, 1956

No. 917

THE DENVER UNION STOCK YARD COMPANY, *Petitioner,*

v.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,
Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

As short reply is necessary, we believe, (1) to make clear beyond any question the wide public importance of the case, and (2) to impose precision upon the Respondent's arguments in its brief in opposition to our petition for certiorari.

I. The Case Is of Wide Public Importance

The wide public importance of the case is revealed by the Respondent's brief in the Court of Appeals although not in its brief in opposition to our petition for certiorari. In the Respondent's brief, pp. 2-3, in

the Court of Appeals, it was stated that the case is of "vast" public importance, that:

> "This case is eagerly watched by the stockyard companies and livestock industry throughout the land. * * * The answer must be given by this Court. It is of vast importance. Tradition is at stake. Undoubtedly the Supreme Court will be asked to decide in the end. The issue is dramatic. We will literally see history in the livestock industry made before our eyes."

Undeniably this case is of wide public importance. Regulations like those in the Denver market are in effect in various terminal stockyards throughout the country. The petition for certiorari by the Secretary of Agriculture in No. 981, in this litigation, refers on p. 10, fn. 3, to numerous regulations which are similar to the regulations in effect in the Denver market. The regulations in the Los Angeles market are said by the Respondent in its brief, p. 2, in the Court of Appeals to be *verbatim ac litteratim* the same as those in Denver.[1] The similarity is equally impressive with respect to the regulations in other stockyards also. For example, the Denver regulations, involved in this case, and the regulations in effect in Baltimore are as follows:

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[1] The Los Angeles regulations are quoted *in extenso* in the Secretary's petition for certiorari, pp. 10-11, fn. 3, in No. 981 in this litigation.

Denver Regulations (R. 40-41)	Baltimore Regulations[2]
"No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company property, or elsewhere, nor shall any other person upon Stock Yard Company property (1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or (2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this Stock Yard; or (3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard."	"No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company property, or elsewhere, nor shall any other person upon Stock Yard Company property (1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or (2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this Stock Yard; or (3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard."
The State of Colorado, with specified areas excepted, is defined as the "normal marketing area from which livestock would normally come" to the Denver market.	There is no definition of "normal marketing area" with respect to the Baltimore regulations.

From Los Angeles to Baltimore, various stockyards throughout the country have regulations identical or significantly similar to the regulations involved in this

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[2] See, Union Stock Yard Co. of Baltimore County, Maryland, Tariff 11, Supp. 13, Rule 14, on file in the Livestock Division, Agricultural Marketing Service, U. S. Department of Agriculture.

case. Some of those regulations in other markets have been in effect for a long period of time. The Kansas City stockyards have had regulations in effect for more than 20 years to prohibit a market agency or other person at that stockyard from soliciting business for other markets or endeavoring "to secure customers to sell or purchase livestock elsewhere."[3]

The review of this case by the Supreme Court is plainly in the public interest. The Court of Appeals held that the Denver regulations are illegal, on their face, as a matter of law and that all evidence as to their reasonableness is, as a matter of law, irrelevant. It is likely, indeed, that the issue which is presented in this case and which has also been presented in an adjudicatory proceeding as to the validity of the Los Angeles regulations[4] will be presented likewise as to the similar regulations in many stockyards listed in the petition for certiorari, pp. 10-15, by the Secretary of Agriculture in No. 981.

II. The Question Presented for Review

The Respondent inaccurately states the question presented by our petition for certiorari.

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[3] See Kansas City Stock Yards Co., Tariff No. 7, § XII, Rule 8, and subsequent tariffs to and including Tariff 12, Rules 9 and 10. These regulations are on file in the Livestock Division, Agricultural Marketing Service, United States Department of Agriculture.

[4] See, *Producers Livestock Marketing Association* v. *Los Angeles Union Stock Yards Company*, P. & S. Docket No. 2188, in the U. S. Department of Agriculture.

The Judicial Officer[5] rejected the Respondent's contention that the regulation of the Petitioner (Stock Yard Company) could be declared invalid on its face as a matter of law, holding that, without a factual hearing, he could not adjudicate the issue as to the "unreasonableness" of the regulation raised by the Respondent. The Judicial Officer thereupon dismissed the Respondent's complaint because the Respondent refused to attend and present evidence at a hearing to support its charges that the regulation is "unreasonable".

Contrary to the Respondent's repetitious assertions in its brief in opposition to our petition, the Stock Yard Company demanded a hearing both on the facts and the law at the outset of the administrative pro-

[5] The Judicial Officer is the highest official in the Department performing adjudicatory functions, pursuant to authority of the Secretary of Agriculture, under a number of important regulatory statutes including the Packers and Stockyards Act of 1921, as amended (42 Stat. 159, as amended, 7 U.S.C. 181 *et seq.*). Under that Act, his decisions are of vital concern to over 450 public stockyards regulated under the Act and to over 5,000 market agencies and dealers, over 1900 packers, and over 1300 live poultry licensees regulated under such law. His decisions are also of critical concern to many thousands of livestock producers and shippers and have an important effect upon the prices paid by consumers for meat and poultry. The present incumbent has occupied the position of Judicial Officer since April 1942, and his decisions, published monthly in the *Agriculture Decisions* (currently comprising 16 volumes), include over 1400 decisions made in cases involving the Packers and Stockyards Act alone. His decisions, like those of other important regulatory agencies charged with the administration of statutes involving complex facts, are entitled to respect by the courts and may not be overturned if they are based on a rational foundation. In numerous cases, this and other courts have upheld decisions of the Judicial Officer.

ceeding (R. 49), never waived its right to such a hearing, and never elected, in any manner, to have the validity of its regulation tested as a matter of law without regard to the facts.

The order dismissing the Respondent's complaint was an exercise of administrative discretion (*Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 142 (1939).

The only proper question before the Court of Appeals related to the validity of the order of dismissal. But the Respondent insisted before that Court—as it does here in its brief in opposition to our petition—that the Court of Appeals should pass upon the validity of the Stock Yard Company's regulation as a matter of law, without consideration of facts, and in the absence of a finding by the Judicial Officer as to the reasonableness or unreasonableness of the regulation. The Court of Appeals did pass upon the validity of the regulation—not upon the basis of the arguments advanced by the Respondent, but upon a theory which had never been urged by the Respondent. Also that Court held that the submission of evidence is not necessary to constitute the "full hearing" required by law; that evidence as to the validity of the regulation is immaterial—no matter by whom presented—; and that, as applied to hypothetical facts not in the record but conjectured by it, the regulation would, in its opinion, be invalid. That Court also invaded the Secretary's discretion by directing the Judicial Officer as to the type of administrative order to be entered.

Therefore, the questions presented to this Court relate to whether the Court of Appeals properly performed its function as a reviewing court. The decision of that Court is in direct conflict with applicable

decisions of this Court. Also, in an astonishing manner, the Court of Appeals departed from the accepted and usual course of judicial proceedings involving the appropriate role of a court reviewing an administrative decision. In view of the numerous similar regulations throughout the nation, the wide importance and public interest of the case calls for a review by this Court.

III. Respondent's Erroneous Statement of the Case

The Respondent would like this Court to believe that it always took the position that the unreasonableness of the Stock Yard Company's regulation could be determined solely as a matter of law and without consideration of the facts. But the truth of the matter is that the Respondent took no such position in its complaint which initiated the administrative proceeding (R. 40). It was only after the time and place for a hearing on the facts had been set, and when the Respondent was faced with the imminent issuance of a subpoena *duces tecum* which would have required it to reveal its records as to its practices (R. 71), that the Respondent suddenly shifted its position. It then announced that it would refuse to attend a hearing, asserted that the regulation should immediately be declared invalid on its face as a matter of law, urged that evidence was immaterial no matter by whom presented, and submitted the case for final decision to the Secretary upon such basis (R. 73).

The Respondent would also like to have this Court believe that the Stock Yard Company agreed with the Respondent's novel method for disposal of the proceeding without a hearing. The truth of the matter is that the Stock Yard Company vigorously opposed the contention that a cease and desist order could be is-

sued in the absence of a full hearing, both on the facts and the law. The Judicial Officer agreed with the Stock Yard Company. The Court of Appeals, while recognizing the Stock Yard Company's contention, held that no factual hearing was necessary. It is manifestly an indication of desperation for the Respondent now to pretend that the Stock Yard Company ever agreed that the statutory standard of reasonableness could be applied to the regulation involved as a matter of law and without consideration of facts.

IV. The Respondent's Argument

The various arguments of the Respondent set forth on pages 9-23, inclusive, of its brief in opposition to our petition are the same arguments which were rejected by the Judicial Officer in his carefully considered decision covering over 26 pages (R. 6-33).

These same arguments were again urged by the Respondent upon the Court of Appeals, but that Court did not adopt any such arguments. Instead, that Court held that the Stock Yard Company's regulation is invalid on its face as a matter of law because the Court considered that the regulation would be invalid as applied to a hypothetical factual situation conjectured by it—a theory which the Respondent had never presented. The hypothetical facts thus conjectured by that Court were said by it to be as follows:

> "If by rendering reasonable service for a Colorado customer at one stockyard a marketing agency is prohibited from rendering reasonable service for the same or a different Colorado customer at another stockyard it is apparent that the agency can not perform its statutory duty in

one regard or another". (Our petition, Appendix, p. 6a).[6]

The Respondent now argues that the facts thus assumed by the Court of Appeals are not hypothetical facts because, the Respondent says, they are true facts, albeit outside the record. The point is, however, that no such facts—nor any of the other facts mentioned by the Respondent in its brief in opposition to our petition—are in the record.

V. Conclusion

At stake in this proceeding is the authority of the owners of the major public stockyards to carry out their statutory duty of establishing and enforcing "reasonable" regulations in respect to the furnishing of stockyard services (§ 307 of the Act, 7 U.S.C. 208). If the decision of the Court below is allowed to stand, an immediate shadow is cast over the regulations of practically all of the public stockyards in this country.

At stake, also, is the authority of the Secretary, acting through his Judicial Officer, to adjudicate disputes concerning stockyard regulations in accordance with the "full hearing" requirements of the law (§ 310 of the Act, 7 U.S.C. 211) and, otherwise, to administer the law in accordance with the discretionary authority conferred upon him. In holding that "evidence is immaterial" to the application of the statutory standard of "reasonableness" to industry regulations, the Court of Appeals has seriously interfered with the

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[6] The word "if" means "in case that; granting, allowing, or supposing that;—introducing a condition or supposition." *Webster's New Collegiate Dictionary*, 1953 ed., p. 412.

primary duty of the Secretary to enforce the law in the light of the relevant facts upon which the determination of questions of "reasonableness" must be made. The Court's decision ignores the basic premise upon which the Congress enacted the Packers and Stockyards Act in 1921—to vest in the Secretary the duty of sifting out the facts under the guidance of a statutory standard of "reasonableness".

Involved, also, are important questions (pp. 2 and 3 of our petition) relative to the proper function of reviewing courts under the Hobbs Act (64 Stat. 1129, 5 U.S.C. Supp. 1031 *et seq.*). The Court below substituted its judgment for that of the Judicial Officer in a manner clearly not compatible with its function of a reviewing court under the Hobbs Act.

Resolution of all of these issues by this Court is of great public importance and of vital concern to the livestock industry and to the Secretary in the administration of this important regulatory statute.

Accordingly, the questions presented by our petition and by that of the Secretary in Number 981 are questions of utmost importance and the respective petitions should be granted.

Respectfully submitted,

WINSTON S. HOWARD
320 Equitable Building
Denver 2, Colorado

ASHLEY SELLERS
ALBERT L. REEVES, JR.
JESSE E. BASKETTE
1625 K Street, N. W.
Washington 6, D. C.
Attorneys for Petitioner